FILED
APR 11 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1951

No. 699

LOY VERNAL IMBODEN,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

STANLEY U. ROBINSON, JR.
5 E. Long Street,
Columbus 15, Ohio,
Attorney for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Loy Vernal Imboden, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit, which Court affirmed the decision and judgment of the United States District Court for the Southern District of Ohio, Eastern Division. The District Court and Court of Appeals held that when Petitioner, a life-long member of the Brethren Church (one of the historic "Peace Churches"), appealed from a local draft board decision refusing him a conscientious objector

classification (the local board having refused to let him present his arguments for such deferment—R152), he could Constitutionally be denied a conscientious objector classification on the basis of alleged information submitted to the Federal Bureau of Investigation by witnesses whose identities were not revealed to him. The ruling of the lower Courts sanctions as legal a procedure being followed in all conscientious objector cases, which procedure provides for a secret, one-sided determination of facts decisive of rights. Since the trials of registrants on the criminal charge of refusal to submit to induction (at which trials they are not permitted to present evidence regarding the sincerity of their beliefs) follows the determination against their claims for conscientious objector status in a "chain reaction" manner, the decisive facts in this type of case are those which form the basis for denying the conscientious objector status. The sources of these facts are never revealed to registrants, despite the fact that they may be compelled to spend five years of their lives in prison because of decisions made on the basis of such facts.

The instant case presents something of the issues ruled on by this Court in *Bailey v Richardson,* 182 F. 2d 46, 341 U.S. 918, and in *Anti-Fascist Committee v McGrath,* 341 U.S. 123. However, the present case goes far beyond the Bailey case and presents greater and far more sinister threats to the Constitutional Guarantees of Due Process of Law, because it involves the use of secret witnesses in proceedings resulting in irrefutable administrative findings of fact, which lead directly to *criminal* convictions.

Statement Of Matters Involved

Petitioner registered with his local draft board on September 7, 1948 (R154) and thereafter filled out and

filed both the regular Selective Service questionnaire and the special form for conscientious objectors (R155 through 166). All statements and information contained in these forms were favorable to his contention that he was a conscientious objector. The local board, nevertheless, classified him 1-A on October 8, 1948 (R14, 162)., and petitioner thereupon duly asked in writing for a hearing before the local board, as he was entitled to do under the regulations (1624.1 & 1624.2). A hearing was granted, and he appeared before the board on October 29, 1948. The clerk of the local board, a former court reporter[1], took down verbatum what was said at this hearing (Exhibit A, R150, 151, 152). This report, plus the undisputed testimony of all witnesses, shows that when petitioner attempted to call the attention of the local board to his claim as a conscientious objector to combatant and noncombatant service, he was told:

> "You are just going to try most anything to keep from going.**You can keep the barracks clean."** and then "Well, that's enough of that.** now, just be prepared to take your physical examination".

Petitioner got no chance whatsoever to explain his position before the local board.

After this hearing, the local board, on the same date, continued petitioner in class 1-A (R162), and petitioner thereafter appealed from this classification. On January 18, 1949, the appeal board "reviewed the file" and determined that he should not be classified 1-A-O or 4E (the two conscientious objector classifications), and it then forwarded the file to the Department of Justice for "appropriate inquiry and hearing" as required by *50 U.S.C.App., 456(j).*

[1] Per oral argument of Assistant U.S. Attorney, Loren G. Windom, when presenting the Government's case before the Court of Appeals.

Petitioner was then notified of a hearing to be held before a Hearing Officer for the Department of Justice (R173), the hearing being for the purpose of enabling the Hearing Officer to make recommendations to the Attorney General, who in turn makes recommendations to the Appeal Board regarding the sincerity of a registrant's conscientious objector claim. The appeal board is required by law to give consideration to the recommendation thus made (*50 U.S.C. App. 456(j)*.

Petitioner was informed in the notice of hearing which he received that he could ask for the general nature and character of any evidence in the Hearing Officer's possession which was unfavorable to or tended to defeat his claim. Petitioner therefore requested such information.

The Hearing Officer, along with every other Hearing Officer throughout the United States had been instructed by a *memorandum from the Attorney General of September 1, 1948*[2] *to Hearing Officers, in Section 5* thereof, not to divulge the source of "confidential information" contained in the reports of the Federal Bureau of Investigation or received from an informant concerning registrants who were scheduled to have hearings concerning their claims for conscientious objector deferment. Following these instructions, the Hearing Officer, in answer to petitioner's request, purportedly summarized in a letter (R 175, 176) "statements and evidence obtained by the Federal Bureau of Investigation which is seemingly unfavorable to your claim" (R 174, 175). The letter stated that the information was obtained from the following persons, whose names and addresses were withheld:

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(2) Because of references made to these instructions in other registrants files which we have examined, we know the source and general nature of these instructions. However, the Office of the Attorney General has refused to honor our request that we be furnished a copy of this letter so that we can set it forth in full for this court to examine.

"A woman who states that she has been an active member of the Glenford Brethren Church for fifty years" * *

"An official of the Glenford Brethren Church" * *

"An official of the Olivet Church of the Brethren at Five Points"

"An official of Ashland College"

"A supervising official of the Glenford Brethren Church since 1945"

"A former supervising official of the Glenford Brethren Church, who has been a minister in the church for fifty years"

These various informants are purported to have stated that they were well acquainted with the members of the Glenford Brethren Church, that they did not know of anyone by petitioner's name who had been connected with the Church, that no records were available to verify petitioner's entrance into the Brethren Church, that the Brethren Church never opposed universal military training, that the matter of military service was strictly a matter of individual feeling, and that the teachings of the Brethren Church would not prevent a man from entering the armed forces if called. Many of these purported statements were contra to claims made by petitioner and, if true, would show petitioner to be a liar.

At the hearing on June 28, 1949, petitioner appeared alone and brought with him certain letters and affidavits, all of which were favorable to his conscientious objector claim (R 170, 176 through 182).

After the hearing, the Hearing Officer in his letter to the Attorney General's office, stated that "the evidence made available by the report of the Federal Bureau of

Investigation tends to sustain the validity and propriety" of refusing to petitioner a conscientious objector classification (R 171, 172). He then recommended that petitioner's claim for such classification be denied. This recommendation was followed by the Appeal Board, which on September 17, 1949, classified petitioner 1-A by a vote of 3 to 0 (R 162). Thereafter petitioner was ordered to report for induction, did report, but refused to take a step forward and be inducted when his name was called.

Jurisdiction

The jurisdiction of this Court is invoked under *Sec. 1254 of U. S. C. A. (Judiciary and Judicial Procedure, Title 28, Ch. 646, Pub. Law 773, 80th Congress).*

The judgment of the United States Court of Appeals Sixth Circuit to be reviewed was entered on February 6, 1952. (See the record filed herewith) A petition for rehearing was denied on March 17, 1952, without opinion.

Questions Presented

1. Does the practice followed by the Department of Justice in conducting all conscientious objector hearings of gathering alleged evidence, which may be unfavorable to registrant's claim for conscientious objector status, from informants whose identity is withheld from registrants, and relying wholly or partly upon such alleged evidence as a basis for recommending denial of conscientious objector deferments, deprive such registrants of rights to which they are entitled under Constitutional guarantees of Due Process of Law, set forth in the *5th and 6th Amendments;* when such registrants are, on the basis of such recommendation, denied conscientious objector deferment, are ordered to report for induction, and are thereafter (without further opportunity at any time to

prove their sincerity) criminally prosecuted for failure to submit to induction?

2. Can a registrant Constitutionally be denied a conscientious objector classification because his beliefs arise partly or wholly from a personal moral code? Is part of *Section 6 (J) of the Selective Service Act of 1948,* as extended, unconstitutional in that it violates the *First Amendment* to the United States Constitution?

Reasons For Allowance Of Certiorari

1. There is a wide spread interest in this case on the part of religious and other groups composed of representative men and women. In view of the fact that this Court has specificially stated in *paragraph 9 (b) of Rule 27* of the Rules of this Court that briefs of an amicus curiae prior to consideration of a petition for writ of certiorari are not favored, these groups are not planning to file or apply to file amicus curiae briefs, but, they have publicly expressed their interest and concern in this case and have helped finance it. These groups include:

> The Ohio-Michigan Area of The American Friends Service Committee.
>
> The Franklin County Council of Churches.
>
> The Ohio League for Constitutional Rights (An organization working in cooperation with The American Civil Liberties Union).

These organizations feel, as petitioner does, that the questions here involved represent far more than the conviction of petitioner, and in fact they represent basic issues awaiting final determination by this Court.

2. This case raises important questions of federal law

which have not been, but should be, settled by this Court.

a. *Can Selective Service Appeal Boards rely wholly or partly upon alleged information gathered from informants whose identity is withheld from registrants to sustain a refusal to grant conscientious objector classifications to registrants, without violating Constitutional guarantees of Due Process of Law set forth in the 5th and 6th Amendments, when the criminal trials of said registrants (at which no evidence of their sincerity or lack of sincerity as conscientious objectors is admissable) for refusal to submit to induction follow the determination against their conscientious objector claims in a chain reaction manner?*

Mr. Justice Frankfurter, in the case of *Anti-Fascist Committee et al v McGrath*, 341 U.S. 123, calls attention to a definition of due process of law which is our keynote in this case. He there states that "Fairness of procedure is due process in the primary sense". We feel certain that this entire Court will concur in this common-sense definition of "The most majestic concept in our whole Constitutional system".

An examination of the facts of the instant case (which facts parallel the practice followed in all conscientious objector appeal cases) clearly shows a complete disregard for fundamental concepts of fair play.

To begin with, this is a *criminal* case. A man's liberty is at stake. One of our deepest rooted traditions is that a man faced with criminal charges is entitled to the fullest protection guaranteed by Due Process of Law. He is entitled to confront and cross-examine the witnesses against him. He is entitled to be acquitted and discharged unless he is proven guilty as charged beyond a reasonable doubt. He is entitled to the benefits of counsel both

during and preceeding his trial. These rights are fundamental and must not be abridged or weakened if this United States is to continue to stand for the great Principles which inspired its birth as a Nation.

How were these rights secured to petitioner in the instant case?

When petitioner appeared before the local draft board, he was prohibited by the regulations *(1624.1)* from being represented by an attorney. He was also refused the right to discuss in any manner whatsoever his claim as a conscientious objector to combatant and non-combatant service (R 152).[a]

When he appealed, petitioner was notified that neither he nor any one acting as advisor for him could make objections or arguments, and that if he or his advisor, if any, did do this, the Hearing Officer could terminate the hearing then and there (See *Instructions to Registrants* printed in appendix hereto).

When petitioner, in accordance with *"Instructions to Registrants"* asked for any evidence in the possession of the Hearing Officer which was unfavorable to him, the names and addresses of those submitting the alleged unfavorable evidence were withheld from him, and he was not permitted to confront or cross-examine them in any manner at any time. This alleged evidence against him was contra to statements he had made and therefore tended, if true, to show that petitioner was a liar.

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[a] Although this deplorable type of conduct is not always followed by local draft boards in considering conscientious objector cases, the possibility that such procedure may well be followed by prejudiced local boards undoubtedly lies behind the decision of Congress to provide for a special appeal procedure in conscientious objector cases *(Sec 6 J* of Act), this procedure being set up by Congress to secure to the conscientious objector the rights to which he is entitled under the law, but of which experience has shown he is often deprived as a result of prejudice on the part of uninformed local boards.

The hearing officer, relying, at least in part upon the statements of unrevealed witnesses, recommended that petitioner's claim for conscientious objector deferment be denied. This recommendation, which the appeal board is required by law to give consideration to, was followed, and petitioner, as could be expected, thereafter refused to submit to induction.

At the trial, as in all trials of this type, the Court would not permit the introduction of any evidence regarding the question of petitioner's sincerity or lack of sincerity as a conscientious objector. As far as the criminal trial was concerned, the findings of the appeal board were conclusive on this point.

This Court held, by an equally divided Court, in the case of *Bailey v Richardson* 341 U. S. 918, that information gathered from unrevealed informants could serve as the basis for discharging a federal employee from his job. However, there was considerable unfavorable comment on this holding by various members of this Court in the *Anti-Fascist Committe case,* supra; and even the dissenters in that case (who presumably were three of those favoring affirmance in the Bailey case) repeatedly stated that they favored affirmance because the *Bailey case* and the *Anti-Fascist Committee case* did not involve criminal action.

Although this Court upheld discharge of federal employees, as disloyal on the basis of evidence from secret witnesses (who may have been "paragons of veracity, knaves, or village idiots"), we are quite certain that, if the U. S. Attorney had been so ill advised as to attempt to obtain *criminal* convictions in the cases of the eleven communists on the basis of secret evidence and without giving the accused men a chance to confront and cross-

examine the witnesses against them, this Court would quite promptly have upset any convictions thus obtained. *In a criminal trial the right of an accused guaranteed him by the Sixth Amendment, to be confronted by and to cross-examine the witnesses against him, can not be taken from him directly or indirectly.*

The real issue in a case in which a man has refused to submit to induction and has attempted to justify his action by claiming he is a conscientious objector is always the question "Is the man sincere?". True, this may be a question that administrative bodies, rather than the Courts, decide; but it is the crucial question. If the administrative bodies decide against the sincerity of the registrant, the refusal of the registrant to submit to induction and his criminal trial for such refusal follow in a chain reaction manner the decision of the administrative bodies against him. It is a foregone conclusion that there will be a refusal to submit to induction. To look at this type of case in any other light is to disregard realities. Thus the procedure followed by the administrative bodies in making their findings, which findings can not be questioned in a later criminal trial, has a very direct bearing on whether or not a registrant has been given the protection to which he is entitled under Due Process of Law.

Mr. Justice Frankfurter stated in the *Anti-Fascist Committe* case, supra,:

> "This court has never held, nor must we now be understood as holding, that *administrative officers, when executing the provisions of a statute involving the liberty of persons,* may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution".

In the instant case, administrative officers are purporting to execute statutory provisions which very definitely involve the liberty of persons, yet they attempt to do it with a total disregard for the provisions of due process, even though the statute and regulations speak only of an "appropriate inquiry" being made, and nowhere provide for the type of action that has actually been taken.

Mr. Justice Frankfurter further states:

> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment".

How do these principles apply to the instant case?

The hurt to petitioner for refusal to allow him the right to confront and cross-examine his witnesses, is, in this case, five years imprisonment. What does the government gain by such refusal? Doubtless it would take more time at a hearing to allow petitioner the right to confront and cross examine informers than to deny him this right. Yet, in cases where all the evidence gathered from secret informers is favorable, no harm is done a registrant by denying full hearing rights. Also, if it is humanly possible to do so, no harm is done a registrant if all unfavorable evidence from secret sources is completely disregarded in reaching a decision. But, if the evidence gathered from unrevealed sources is unfavorable, and if the Department of Justice intends to rely wholly or partly upon such evidence in making its recommendation, then elementary

concepts of fair play require that the right to confront and cross-examine these witnesses be granted at some stage of the proceedings.

To save a little time at the possible expense of a man's liberty and good name is wholly unjustified. Congress never authorized the procedure here outlined, but spoke only in terms of an "appropriate inquiry" being made and a hearing held *(Section 6 J of the Selective Service Act of 1948,* and *Regulation 1626.25).* The Department of Justice, to use Mr. Justice Douglas's words has succumbed to the "temptation to take short-cuts by borrowing from the totalitarian techniques of our opponents." Without knowing who his accusers were, this petitioner had no way of defending against their statements. He has been condemned without the decencies of a fair chance, and this is abhorrent to fundamental justice. There has been a "secret one-sided determination of facts decisive of rights" in this criminal case. Due Process of Law prohibits such action.

6. *Can a registrant constiutionally be denied a conscientious objector classification because his beliefs arise partly or wholly from a personal moral code?*

Section 6, (J) of the Selective Service Act of 1948, which contains the section granting deferment to conscientious objectors, (set forth in full in addendum) provides that those "who, by reason of religious training and belief, (are) conscientiously opposed to participation in war in any form" shall be deferred. This section defines "religious training and belief" as "an individual's belief in relation to a Supreme Being, involving duties superior to those arising from any human relation", but not (among others) "a merely personal moral code."

The *1940 Selective Service Act (Section 5 G)* also used

the words "by reason of religious training and belief", but it did not go on to define these terms as the 1948 Act has. Under that law, Circuit Judge Augustus N. Hand, in *United States v Kauten* 133 F 2d 703, held that it was possible for a professed atheist to qualify for deferment as a conscientious objector. The present law attempts to rule out such a possibility.

In the instant case, the hearing officer, in recommending denial of conscientious objector status for petitioner, relied in part on his finding that petitioner "relies mostly upon his personal conviction respecting non-participation in war as a cause for his exemption, from military training". (R 171) We do not believe that this finding accurately portrays the basis of petitioners beliefs, but we recognize the fact that it served as part of the basis for denying this claim. We therefore feel that we are entitled to question the validity of this provision of the law. The Court of Appeals in this case held that "Congress was within its rights in refusing to recognize it (claim for conscientious objector deferment) unless it included more than a merely personal moral code."

Although we are in complete harmony with the statement in the dissent of Mr. Chief Justice Hughes in the *MacIntosh Case* (283 U. S. 605), which dissent later became the law in the *Girouard case* (328 U. S. 61), which states that certain legislation "is indicative of the actual operation of the principles of the Constitution; that a person with conscientious *or* religious scruples need not bear arms", we do not intend to argue here the question of whether or not Congress was compelled by the Constituton to make provisions for conscientious objectors. We shall assume, without admitting it, that such is not the case.

Conceding the right of Congress to make no provisions

for conscientious objectors, it still must be recognized that there are constitutional limits to the discrimination Congress can provide for in regulations it chooses, in its discretion, to make. To cite a parallel situation, this Court has always held that municipal corporations, even though they concededly had the power to enact or refuse to enact zoning regulations, could not constitutionally enact zoning regulations which set aside certain territories as negro districts *(10 American Jurisprudence, Page 908, Paragraph 14)*. Similarly, Congress could not set up provisions for conscientious objectors but provide that no negro, regardless of other facts, could claim the benefits of such provision. Neither can Congress constitutionally say to a registrant "you cannot qualify for this deferment, regardless of your sincerity, solely because you are a Catholic (and the Catholic Church does not teach conscientious objection to war), or solely because you are an atheist (and therefore don't believe in a Supreme Being—holding your beliefs purely as a personal moral code). To permit such discrimination is to honor a law which aids one religion over another, or which aids all religions as against the non-religionists. Such a law was clearly condemned as a violation of the First Amendment in *Illinois ex rel McCollum v Board of Education* 333 U. S. 203.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, commanding that Court to certify and send to this Court, on a day certain to be herein named, a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket 11420, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States

Court of Appeals for the Sixth Circuit may be reversed by this Court; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

LOY VERNAL IMBODEN, *Petitioner,*

Stanley U. Robinson, Jr.
5 East Long Street
Columbus 15, Ohio
Attorney for Petitioner

Columbus, Ohio
April 8, 1952

BRIEF IN SUPPORT OF THE PETITION

Opinion Below

The opinion of the United States Court of Appeals for the Sixth Circuit, Docket No. 11420 was entered on February 6, 1952. A petition for rehearing was filed within the time provided by the rules of that Court. The order denying the petition for rehearing was entered on March 17, 1952. Both the opinion and the order are printed at the end of the record filed herein.

Jurisdiction

The grounds under which jurisdiction of this Court is involved are set forth in the Petition preceeding this Brief.

Statement Of The Case

The Statement of the Case appears in our Petition and is not repeated here.

Specification Of Errors

The Court of Appeals erred in ruling against Petitioner on each of the issues set forth in his Petition.

Statutes Involved

The pertinent provisions of the 1948 Selective Service Act, the regulations thereunder and instructions to registrants are set forth at the end of this Brief.

Argument

Because of the number of cases cited in the Petition and the Civil Rights questions involved, which are most familiar to this Court, no extended argument is presented

here. Considerable material of which this Court would want to be informed in deciding the issues if Certiorari is granted has been omitted.

In addition to calling to the Court's attention the great public interest that the issues here involved created in the minds of a great many people, we want to add that we consider the implications of the decision of the Court of Appeals of far-reaching importance. We believe, and we so submit, that if the decision of the Court of Appeals is permitted to stand then every registrant claiming deferment as a conscientious objector can be denied such deferment and be criminally prosecuted and convicted for the refusal to submit to induction, which inevitably follows the denial of such claim, wholly or partly on the basis of so-called evidence submitted by unknown witnesses who are, contrary to all accepted principles of fair procedure in criminal cases, exempted from the obligation of at any time facing the accused and submitting to cross-examination by him.

It was the intent of Congress, when it set up provisions for deferring conscientious objectors, to defer from military service the sincere conscientious objector and to condemn to prison the sham. This intent can be given effect only when a fair hearing is granted a registrant, at which hearing the issue of his sincerity or lack of sincerity can be explored in a manner which is in keeping with the fundamental principles inherent in due process of law. The present practice not only fails to meet such test, but involves "Star Chamber" proceedings of the most dangerous sort. (*In re Oliver* 333 U. S. 257, *Brinkerhoff-Fairs Co. v Hill* 281 U. S. 673, *Anti-Fascist Committee v McGrath* 341 US 123).

We submit that both the legal and the social implica-

tions of the case require that this Court grant a Writ of Certiorari, and upon hearing of the issues, make its decision known.

Respectfully submitted,
STANLEY U. ROBINSON, JR.
5 East Long Street
Columbus 15, Ohio
Attorney for Petitioner

Columbus, Ohio
April 8, 1952

ADDENDUM

Section 6 (j) of the Selective Service Act of 1948:

(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service

as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Regulation 1626.25

1626.25 Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.— (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such

registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class IV-E. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class IV-E, but does find that the registrant is eligible for classification in Class IV-E, it shall place him in that class.

(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class IV-E or in Class IV-E, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

(b) No registrant's file shall be forwarded to the

United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the "Minutes of Action by Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class IV-E under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.

(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

Instructions to Registrants

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

September 1, 1948

INSTRUCTIONS TO REGISTRANTS WHOSE CLAIMS FOR EXEMPTION AS CONSCIENTIOUS OBJECTORS HAVE BEEN APPEALED.

Pursuant to the provisions of section 6(j) of the Selective Service Act of 1948 and Section 626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the objections of each registrant whose claim for exemption from training and service under the said Act on the ground that he is conscientiously opposed to participation in war in any form has been denied (or granted) by a local board and an appeal has been taken to an appeal board.

1. In each instance, the hearing will be conducted by a duly designated "hearing officer", and the registrant will be duly notified by the hearing officer of the place and time fixed for the hearing on his claim.

2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence.

3. At the hearing by the hearing officer of the Department of Justice, the registrant will be permitted to make a full and complete presentation of his claim. He may bring with him to the hearing as witnesses any persons who have personal knowledge of facts concerning his religious training and belief and concerning the character and good faith of his objections to participation in war in any form.

4. The registrant may bring with him and submit at the hearing written statements of persons not present at the hearing containing facts and information within their personal knowledge concerning the registrant's religious training and belief and the character and good faith of his objections to participation in war in any form. Such statements shall be sworn to before a notary public or other person authorized to administer oaths. The registrant may also submit at the hearing any papers or documents, or certified copies thereof, tending to support his claim. If the registrant is unable to appear personally at the hearing, he may mail all such statements, documents, etc., to the hearing officer at his address given in the notice of hearing.

5. The hearing will not be in the nature of a trial of judicial proceeding, but will be informal and non-legalistic. Registrants will not be required to adhere to the ordinary rules of evidence. It will not be necessary for the registrant to be represented at the hearing by an attorney. The registrant may bring with him a relative or friend or other advisor, who may sit with him at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under the direction and control of a duly designated hearing officer, who may

terminate the proceeding upon the violation of these instructions by the registrant or his advisor.

6. Ordinarily, no stenographic record of the oral testimony given at the hearing will be made. However, the hearing officer may, in his discretion, have such record made.

TOM C. CLARK
Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 699

LOY VERNAL IMBODEN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 236-249) is reported at 194 F. 2d 508.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1952 (R. 235), and a petition for a rehearing was denied on March 17, 1952 (R. 251-261). The petition for a writ of certiorari was filed on April 11, 1952. The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Under Section 6 (j) of the Selective Service Act of 1948, a registrant whose claim of exemption from combatant training and service because of conscientious objections is denied by the local board may appeal to an appeal board. Before the appeal board acts, "The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned," and make a recommendation to the appeal board. Section 6(j) further provides that "The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board." The question is whether in such a hearing the withholding from petitioner of the names of, but not the information given by, confidential informants regarding the good faith of his conscientious objector claim, deprived him of rights under the Fifth and Sixth Amendments.

2. Whether Section 6(j) of the Selective Service Act of 1948 is unconstitutional in according exemption to those whose objection arises from religious training and belief, and not to those whose objection is based on a personal moral code.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix (*infra*, pp. 13-20).

STATEMENT

Petitioner was charged in a one-count indictment (R. 2), returned in the District Court for the Southern District of Ohio, with refusing to be inducted into the United States Army, in violation of 50 U.S.C. App. 462 and Regulation 1632.14 (*infra*, pp. 15, 20). The jury having found him guilty (R. 124, 141), the court sentenced him to imprisonment for five years (R. 145). On appeal (R. 146), the Court of Appeals unanimously affirmed the conviction (R. 235).

The evidence may be summarized in pertinent part as follows:

Petitioner, born on September 16, 1925 (R. 215), had obtained three agricultural deferments as a farm worker during World War II when such deferments were mandatory (R. 67, 87-88). On September 7, 1948, he registered under the 1948 Selective Service Act (R. 153-154). On September 28, 1948, he filed his classification questionnaire in which he stated that he was an agricultural worker and a conscientious objector (R. 155, 159, 161). On October 5, he filed a special form for conscientious objectors in which he stated that his religious convictions against war had been derived from Sunday school lessons and

sermons at the Brethren Church, that the individual upon whom he relied for guidance was Reverend Imboden [his father], and that his convictions had been demonstrated by his actions at home and at work (R. 163-166). On October 8 he was classified 1-A by his local draft board (R. 14, 44, 162).

At petitioner's request, the local board granted him a hearing on October 29 regarding a possible change in classification (R. 227, 231). At this hearing, petitioner urged exemption as a farmer and as a conscientious objector. The chairman of the board told him, "You realize you got out of that other war because you were essential * * *. As far as this new Selective Service is concerned there is going to be no farm deferment. * * * Before your farm produce was essential to feed the large armies, but now there is plenty of it." (R. 31-34, 45-47, 150-153.) Petitioner told the board, "I don't believe in it—in the army or navy or anything else" (R. 33, 152). The board continued petitioner's classification as 1-A (R. 162).

On November 10, 1948, petitioner appealed to the appeal board, which on January 18, 1949, affirmed his 1-A classification, determining that he should not be classified 1-A-O or IV-E, the two conscientious objector classifications (R. 162, 223-224). Meanwhile petitioner had passed his army physical examination, and was accepted for service but not inducted (R. 162, 195-198, 217, 228, 233).

On January 19, 1949, in accordance with 50 U.S.C. App. 456(j) and Regulation 1626.25 (*infra*, pp. 13-15, 16-20), the appeal board forwarded petitioner's file to the local United States Attorney so that he could obtain an advisory recommendation on the conscientious objector question from the Department of Justice (R. 182). On June 15, 1949, petitioner was notified by the Department of Justice's hearing officer that his hearing would take place on June 28, and on June 17 petitioner wrote the hearing officer requesting any unfavorable information tending to defeat his claim for exemption as a conscientious objector (R. 173-174). In a reply letter of June 23, the hearing officer referred to certain informants, without naming them, but identifying them as members or officials of the church, who had told F.B.I. investigators that they did not know anyone by the name of Imboden connected with the Glenford Brethren Church (where petitioner claimed attendance), that there were no available records to verify his entrance into this church, that this church never opposed universal military training, and that the question of military service was strictly a matter of individual feeling. The letter also stated that petitioner had previously been deferred as an essential agricultural worker rather than as a conscientious objector, and that his oldest brother did not at any time file a claim as a conscientious objector, but

had served in the United States Navy, and been released as an Ensign, attached to the United States Naval Reserve. (R. 174-176, 182-185.) At the hearing which was held on June 28, petitioner testified before the hearing officer about his claim as a conscientious objector and submitted proof by affidavit of his membership in the Brethren Church, and statements, including one from his father, to the effect that he had been taught opposition to strife (R. 51, 53-57, 176-181). After learning from the hearing officer that his file contained evidence obtained from ministers of the Brethren Church that its teachings were not opposed to universal military training, petitioner stated that he relied mostly on his own personal conviction respecting non-participation in war as a basis for his claim to exemption from military training (R. 38, 171). On July 8, the Department of Justice concurred in the hearing officer's recommendation against petitioner's claim on the ground that he had failed to prove that his objections were based upon conscientious convictions arising out of religious training and belief. The report of the hearing examiner states that "the evidence made available by the report of the Federal Bureau of Investigation tends to sustain the validity and propriety of such determination" (R. 35-39, 167-172). On September 17, 1949, the appeal board's 1-A classification was mailed to petitioner (R. 57, 162).

On July 17, 1950, petitioner was ordered to report for another physical examination which he passed on August 7 (R. 16, 57, 199-202, 230-231, 232-233). On September 8, 1950, he reported at Fort Hayes, Ohio, in response to a notice dated August 22 to report for induction (R. 162, 194). However, on two occasions he refused to take the required step forward to indicate his induction, and declined to sign a written statement that he refused to be inducted into the Army. He was then sent home from the Army camp. (R. 17, 26-27, 28-29, 60, 162, 187-189.)

ARGUMENT

1. Petitioner contends (Pet. 8-13) that his rights under the Fifth and Sixth Amendments were violated because the administrative order, which he was accused of disobeying, was issued after proceedings in which he was not given the names or allowed to confront adverse informants. The fundamental error in this argument is the premise that the draft board and hearing officer proceedings are part of a criminal trial. It was not the purpose of these proceedings to try petitioner for violation of a criminal law; he was merely accorded a hearing to determine his proper draft classification.

The purpose of the Selective Service system is to raise an army. It has long been settled that, in accomplishing that purpose, draft boards do not

act as courts, and draft registrants are not entitled to the constitutional safeguards applicable to criminal trials. See *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304; *Harris* v. *Ross*, 146 F. 2d 355 (C.A. 5); *Peterson* v. *United States*, 173 F. 2d 111, 115 (C.A. 6), certiorari denied, 337 U.S. 925; *Niznik* v. *United States*, 173 F. 2d 328, 336 (C.A. 6), certiorari denied, 337 U.S. 925; *United States* v. *Pitt*, 144 F. 2d 169, 172 (C.A. 3); *Ex parte Stanziale*, 138 F. 2d 312, 314 (C.A. 3), certiorari denied, 320 U.S. 797.

A criminal trial does not, as petitioner contends (Pet. 11), automatically follow the denial of a claim for exemption. Only a claimant's act of refusal to be inducted gives rise to a criminal trial. If he acts in conformity with the adverse ruling of the draft boards, as many conscientious objectors undoubtedly have done, he never becomes subject to a criminal trial for failure to submit to induction.

This Court in *Cox* v. *United States*, 332 U.S. 442, 453, and *Estep* v. *United States*, 327 U.S. 114, 121-122, clearly defined the scope of review available to one who undertakes wilfully to refuse to obey the administrative order. On his trial for such refusal, the trial court may pass on the validity of the order only to determine whether the draft board was acting within its jurisdiction and whether there was a basis in fact for the classification.

If petitioner's contention be interpreted as a claim that the refusal to disclose the names of the F.B.I. informants constituted such a violation of due process as to deprive the draft board of jurisdiction, the contention is clearly without merit. While petitioner was not given the names of the informants, he was fully advised as to the status of the informants[1] and the substance of their statements (R. 183-184). Cf. *Bailey* v. *Richardson,* 182 F. 2d 46, 55-57 (C.A. D.C.), affirmed, 341 U.S. 918. Petitioner, in rebuttal of the statements of the informants, produced several of his own written statements and affidavits of others, and he himself testified at length before the hearing officer (R. 37-38, 170-171, 176-181). The report of the hearing officer shows that his recommendation was based primarily on petitioner's own testimony, and that the statements of the F.B.I. informants were referred to merely as supporting the conclusion reached on the basis of petitioner's evidence.

Moreover, in requiring the Department of Justice to hold a hearing, "after appropriate inquiry," it is inconceivable that Congress intended to accord persons claiming exemption as conscientious objectors a right to a trial type of hearing which is not accorded to any other class of

[1] E.g. "an active member of the Glenford Brethren Church"; "an official of Glenford Brethren Church"; "an official of Ashland College" (R. 183).

registrants. Such a hearing is not required by due process of law, since there is no constitutional right to an exemption from military service. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 161. Also, in Section 13 (50 U.S.C. App. 463) Congress specifically provided that functions under the Selective Service Act should be exempted from the Administrative Procedure Act, thereby indicating a purpose not to elaborate and prolong the procedure of induction. Finally it should be noted that the inquiry and hearing conducted by the Department of Justice result merely in a recommendation which the appeal board may follow or reject as it sees fit. We believe that Congress intended that a hearing which is in no sense decisive should consist of an opportunity for the registrant to present his views, rather than a formal trial. This has been the Department's consistent interpretation of Section 6(j) (see petition for certiorari, p. 25).

2. Petitioner argues that Section 6(j) of the Selective Service Act of 1948, 50 U.S.C. App. 456(j) (*infra*, pp. 13-15) is unconstitutional in that it discriminates, in its classification of eligible conscientious objectors, against persons who, like himself, base their objections upon a personal moral code rather than upon religious training and belief (Pet. 13-15; R. 38, 171).

There is, however, no constitutional right to be relieved from service in the armed forces.

Jacobson v. *Massachusetts,* 197 U.S. 11; *Hamilton* v. *Regents,* 293 U.S. 245, 266. The privilege of deferment or exemption is a matter of grace granted by Congress on the terms which it sees fit to impose. While it may be, as petitioner argues, that Congress may not grant exemption on an arbitrary and capricious basis, it is clear that the legislative classification of persons to whom the privilege is accorded must be sustained if it rests on a rational basis. See *United Public Workers* v. *Mitchell,* 330 U.S. 75.

Clearly there is a rational basis for this legislative judgment that there is a distinction between those whose opposition to service is based upon religious training and belief in their relationship to a Supreme Being and those whose opposition stems from their own personal convictions.[2] Congress might well see fit to recognize the scruples of those who feel compelled to their position by such training and belief and not to recognize those who reach their conclusions on the basis of their own "essentially political, sociological, or philosophic

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[2] Under the 1940 Act there was an unresolved conflict as to whether persons whose conscientious objection was based on a personal moral code were exempt. Cf. *United States* v. *Berman,* 156 F. 2d 377 (C.A. 9), certiorari denied, 329 U.S. 795, with *United States ex rel. Reel* v. *Badt,* 141 F. 2d 845 (C.A. 2). The legislative history of the 1948 act, which specifically denied exemption to those whose objection is based on a personal moral code, shows that Congress intended the *Berman* view to prevail. Sen. Rep. No. 1268, 80th Congress, 2d sess., p. 14.

views or a merely personal moral code" (Section 6(j)).

The classification is also reasonable as a matter of practical administrative procedure. If each hopeful conscientious objector, in order to be deferred, were required only to state that he had a personal moral code opposed to participation in war in any form, the already difficult problem of raising an adequate army for our national defense would be made even more troublesome. The good faith of a conscientious objector who is a regular member of a church, the teachings of which unequivocally oppose participation in war in any form, is much more susceptible of accurate determination than the sincerity of one who merely states that his own personal moral code is to that effect. The Congressional judgment, founded as it is on a rational basis, must be accepted as conclusive.

CONCLUSION

The case was decided on settled principles of law, and there is no conflict in decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MAY 1952.

APPENDIX

The Selective Service Act of 1948 provides in pertinent part as follows:

Section 6 (j), 50 U.S.C. App. 456 (j), 62 Stat. 612-613:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from com-

batant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recom-

mendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Section 12 (a), 50 U.S.C. App. 462 (a), 62 Stat. 622:

> Any * * * person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall * * * be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

32 Code of Federal Regulations 1949 Edition provides in pertinent part as follows:

> § 1622.5 *Class I-A: Available for military service.* (a) In Class I-A shall be placed every registrant who is not eligible for classification in Class I-C and has failed to establish to the satisfaction of the local board, subject to appeal provided in this part, that

he is eligible for classification in another class.

§ 1624.1 *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. * * *

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: * * * *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than Class I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class IV-E. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class IV-E, but does find that the registrant is eligible for classification in Class IV-E, it shall place him in that class.

(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class IV-E or in Class IV-E, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the "Minutes of Actions by Local Board and Appeal Board" on the Classification Questionaire (SSS Form No.

100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class IV-E under the circumstances set forth in paragraph (a) (2) or (4) of this section.

(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the Department of Justice, the appeal board shall

determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

§ 1632.14 *Duty of registrant to report for and submit to induction.* (a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. * * *

(b) Upon reporting for induction, it shall be the duty of the registrant * * * (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be acomplished, (5) to submit to induction, * * *.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1951

No. 699

LOY VERNAL IMBODEN,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

1(a) The Government claims that a criminal trial does not automatically follow denial of a claim for deferment as a conscientious objector—stating that the registrant can obey the induction order and thereby avoid criminal proceedings. Counsel for the Government apparently does not truly understand what a conscientious objector is. A sincere conscientious objector is a man who is motivated by such strong beliefs that he will unhesitatingly face martyrdom rather than do any act in violation of those beliefs. A man who claims to be a conscientious objector but who, when that claim is denied, submits to induction and does what he previously said he could not in good conscience do, is a sham—no less. The man who is sin-

cere in his claim will *always* refuse induction and take the consequences—be that acquittal (because he was not given a fair chance to prove his sincerity), imprisonment, or (as has happened in other nations) death.

The very fact that the sincere objector and not the sham is the one most likely to face prosecution is a most compelling reason for requiring our Government to follow fair procedures when dealing with people in petitioner's position.

1(b) The Government claims that the fact that Congress provided a special appeal procedure in conscientious objector cases does not indicate that Congress intended to accord such persons, claiming exemption as conscientious objectors, a right to a trial type of hearing which is not accorded to any other class of registrants. On the contrary, we feel that the very fact that Congress set up a special requirement for inquiry and hearing on appeal in this type of case *and no other* indicates a Congressional intent to handle this class of registrants in a different manner from all other types of registrants.

All appeals other than those involving conscientious objector claims go to the appeal boards solely on the record made up in the local board. There is no new hearing at the appeal level. Also—significantly—at the local board level, no confidential information can be withheld from registrants under the regulations *(Regulation 1606.31, et sec.;* also *Regulation 1623.1).* Thus, as things now stand, *no other type of registrant is faced with a secret file of any sort.*

1(c) Regarding the Government's contention that the evidence from unrevealed informants was not the primary basis used for denying a conscientious objector deferment in this case, we submit that when a report contains im-

proper matter, the burden is on the prosecution to show that the report did not in any way affect the board's decision *(U.S. v Balogh, 157 Fed 2d939, Syl 4)*. The government made no attempt to meet such burden in this case, but, on the contrary, the entire trial was conducted by the trial Court, over our objections, on the theory that it made no difference whether the appeal board did or did not rely, either wholly or partly, on the evidence from unrevealed informants (R96, 105, 140).

1(d) One question constantly recurs to us. What does the Department of Justice feel that it gains by withholding names of informants from registrants in this type of case? Although we contend that registrants are entitled to meet F.B.I. informants face to face, we recognize that even the mere disclosing of names and addresses in advance of hearings would help registrants prepare their presentations at the hearings. A history of ill-feeling between a witness and the registrant might be shown by way of proving that malice motivated the statements of the witness. Or a witness who had gotten excited and confused when being interviewed by the F.B.I. (which frequently happens) could be contacted by the registrant and be asked to send in a statement correcting and explaining his own previous statement.

We can understand why the Department of Justice may not want to reveal the identities of witnesses against people in Government jobs who are suspected of disloyalty (although we sincerely feel that this Court erred dangerously in affirming the *Bailey case, 341 U.S. 918)*. In such a situation, the witnesses may be key spies who have worked their way into the inner circles of subversive groups. Revealing their identities would end their usefulness to the Government.

But here we have no such situation. Individual inform-

ants generally have personal knowledge regarding only one, or a very few registrants. What dire consequences can befall them or the Government if their identities are revealed to registrants? Refusal under such circumstances to even reveal identities, whether permitting cross-examination or not, is certainly a violation of due process of law, and makes a nullity of the directive of Congress *(section 6J of act)* that the investigation and hearing must be "appropriate" (i.e.—fair).

The secret witness type of procedure is too fraught with danger to our fundamental Constitutional rights to be permitted when no compelling reason for secrecy exists.

2. In attacking our claim under question 2, Government counsel assumes we are contending that Congress may not grant or refuse deferment on an arbitrary or capricious basis. It is, of course, true that Congress can not act capriciously, but our contention relates not to caprice but to the Constitution. We contend that Congress can not, in granting an exemption it is not required to grant, transgress Constitutional limits and grant or withhold exemption on any basis which aids one religion over another or which aids all religions as against the non-religionists. In view of the possible unsettling influence of this Court's opinion rendered on April 28, 1952 in #431, October Term 1951, *Zorach, et al v Board of Education* as related to the case of *McCollum v Board of Education 333 U.S. 203,* we believe it is now even more important that this Court review petitioner's case on the merits and let its decision be known—thereby possibly settling the doubts which have been raised in the minds of many people by *the Zorach case.*

CONCLUSION

The problem of the use of secret files and secret wit-

nesses is a growing one. When its use was attempted in Ohio against a public utility in a rate case, such use was promptly and unanimously condemned by this Court in *Ohio Bell Telephone Co. v Public Utilities Commission of Ohio, 301 U.S. 292.* When it was tried against a federal employee, this Court could not muster a majority to decide either way, and affirmed its use by an equally divided Court in *Bailey v Richardson 341 U.S. 918.* Attempts are now being made to use similar devices against public school teachers. Similar attempts in other fields are sure to follow.

It is bad enough to discharge public servants on the basis of information obtained from unknown witnesses, but it is completely beyond Constitutional bounds to directly or indirectly use evidence from secret witnesses to obtain a criminal conviction.

It is inevitable that this Court will be called upon to mark the limits which must be observed in the use of secret files and secret witnesses. The instant case calls for the marking of some of those limits.

A writ of Certiorari should be granted so that this Court can review the case on the merits and make its decision known regarding this growing problem.

Respectfully submitted,
STANLEY U. ROBINSON, JR.
5 East Long Street
Columbus 15, Ohio
Counsel for Petitioner

Columbus, Ohio
May 21, 1952